

LEGISLATURE OF NEBRASKA

ONE HUNDRED FIRST LEGISLATURE

SECOND SESSION

**LEGISLATIVE BILL 801**

FINAL READING

Introduced by Fulton, 29; Pirsch, 4.

Read first time January 08, 2010

Committee: Judiciary

A BILL

1 FOR AN ACT relating to consumer protection; to amend sections  
2 87-301, 87-303, 87-303.02, 87-303.03, and 87-306, Reissue  
3 Revised Statutes of Nebraska, and section 87-302,  
4 Revised Statutes Supplement, 2009; to change provisions  
5 relating to the Uniform Deceptive Trade Practices Act;  
6 to harmonize provisions; and to repeal the original  
7 sections.

8 Be it enacted by the people of the State of Nebraska,

1           Section 1. Section 87-301, Reissue Revised Statutes of  
2 Nebraska, is amended to read:

3           87-301 For purposes of the Uniform Deceptive Trade  
4 Practices Act, unless the context otherwise requires:

5           (1) Access software provider means a provider of  
6 software, including client or server software, or enabling tools  
7 that do any one or more of the following: (a) Filter, screen,  
8 allow, or disallow content; (b) pick, choose, analyze, or digest  
9 content; or (c) transmit, receive, display, forward, cache, search,  
10 subset, organize, reorganize, or translate content;

11           (2) Appropriate inventory repurchase program means a  
12 program by which a plan or operation repurchases, upon request  
13 and upon commercially reasonable terms, when the salesperson's  
14 business relationship with the company ends, current and marketable  
15 inventory in the possession of the salesperson that was purchased  
16 by the salesperson for resale. Any such plan or operation shall  
17 clearly describe the program in its recruiting literature, sales  
18 manual, or contract with independent salespersons, including the  
19 disclosure of any inventory that is not eligible for repurchase  
20 under the program;

21           ~~(1)~~ (3) Article shall mean means a product as  
22 distinguished from its trademark, label, or distinctive dress in  
23 packaging;

24           (4) Attorney General means the Attorney General of the  
25 State of Nebraska or the county attorney of any county with the

1 consent and advice of the Attorney General;

2 (5) Cable operator means any person or group of persons  
3 (a) who provides cable service over a cable system and directly or  
4 through one or more affiliates owns a significant interest in such  
5 cable system or (b) who otherwise controls or is responsible for,  
6 through any arrangement, the management and operation of such a  
7 cable system;

8 ~~(2)~~ (6) Certification mark shall mean means a mark used  
9 in connection with the goods or services of a person other than  
10 the certifier to indicate geographic origin, material, mode of  
11 manufacture, quality, accuracy, or other characteristics of the  
12 goods or services or to indicate that the work or labor on the  
13 goods or services was performed by members of a union or other  
14 organization;

15 ~~(3)~~ (7) Collective mark shall mean means a mark used by  
16 members of a cooperative, association, or other collective group  
17 or organization to identify goods or services and distinguish them  
18 from those of others, or to indicate membership in the collective  
19 group or organization;

20 (8) Commercially reasonable terms means the repurchase of  
21 current and marketable inventory within twelve months from the date  
22 of purchase at not less than ninety percent of the original net  
23 cost, less appropriate setoffs and legal claims, if any;

24 (9) Compensation means a payment of any money, thing of  
25 value, or financial benefit;

1           (10) Consideration means anything of value, including the  
2 payment of cash or the purchase of goods, services, or intangible  
3 property. The term does not include the purchase of goods or  
4 services furnished at cost to be used in making sales and not for  
5 resale or time and effort spent in pursuit of sales or recruiting  
6 activities;

7           (11) Covered file-sharing program means a computer  
8 program, application, or software that enables the computer on  
9 which such program, application, or software is installed to  
10 designate files as available for searching by and copying to one or  
11 more other computers, to transmit such designated files directly to  
12 one or more other computers, and to request the transmission of  
13 such designated files directly from one or more other computers.  
14 Covered file-sharing program does not mean a program, application,  
15 or software designed primarily to operate as a server that is  
16 accessible over the Internet using the Internet Domain Name System,  
17 to transmit or receive email messages, instant messaging, real-time  
18 audio or video communications, or real-time voice communications,  
19 or to provide network or computer security, network management,  
20 hosting and backup services, maintenance, diagnostics, technical  
21 support or repair, or to detect or prevent fraudulent activities;

22           (12) Current and marketable has its plain and ordinary  
23 meaning but excludes inventory that is no longer within its  
24 commercially reasonable use or shelf-life period, was clearly  
25 described to salespersons prior to purchase as seasonal,

1 discontinued, or special promotion products not subject to the plan  
2 or operation's inventory repurchase program, or has been used or  
3 opened;

4 (13) Information content provider means any person or  
5 entity that is responsible, in whole or in part, for the creation  
6 or development of information provided through the Internet or any  
7 other interactive computer service;

8 (14) Interactive computer service means any information  
9 service, system, or access software provider that provides or  
10 enables computer access by multiple users to a computer server,  
11 including specifically a service or system that provides access  
12 to the Internet and such systems operated or services offered by  
13 libraries or educational institutions;

14 (15) Inventory includes both goods and services,  
15 including company-produced promotional materials, sales aids,  
16 and sales kits that the plan or operation requires independent  
17 salespersons to purchase;

18 (16) Inventory loading means that the plan or operation  
19 requires or encourages its independent salespersons to purchase  
20 inventory in an amount which exceeds that which the salesperson can  
21 expect to resell for ultimate consumption or to a consumer in a  
22 reasonable time period, or both;

23 (17) Investment means any acquisition, for a  
24 consideration other than personal services, of personal property,  
25 tangible or intangible, for profit or business purposes, and

1 includes, without limitation, franchises, business opportunities,  
2 and services. It does not include real estate, securities  
3 registered under the Securities Act of Nebraska, or sales  
4 demonstration equipment and materials furnished at cost for use in  
5 making sales and not for resale;

6 ~~(4)~~ (18) Mark shall mean means a word, name, symbol,  
7 device, or any combination of the ~~foregoing~~ a word, name, symbol,  
8 or device in any form or arrangement;

9 ~~(5)~~ (19) Person shall mean an individual, means a natural  
10 person, a corporation, a government, or a governmental subdivision  
11 or agency, a business trust, an estate, a trust, a partnership,  
12 a joint venture, a limited liability company, an unincorporated  
13 association, a sole proprietorship, two or more of any of the  
14 foregoing having a joint or common interest, or any other legal or  
15 commercial entity;

16 (20) Pyramid promotional scheme means any plan or  
17 operation in which a participant gives consideration for the  
18 right to receive compensation that is derived primarily from  
19 the recruitment of other persons as participants in the plan  
20 or operation rather than from the sales of goods, services, or  
21 intangible property to participants or by participants to others.  
22 A limitation as to the number of persons who may participate, or  
23 the presence of additional conditions affecting eligibility, or  
24 upon payment of anything of value by a person whereby the person  
25 obtains any other property in addition to the right to receive

1 consideration, does not change the identity of the scheme as a  
2 pyramid promotional scheme;

3 (21) Referral or chain referral sales or leases means any  
4 sales technique, plan, arrangement, or agreement whereby the seller  
5 or lessor gives or offers to give a rebate or discount or otherwise  
6 pays or offers to pay value to the buyer or lessee as an inducement  
7 for a sale or lease in consideration of the buyer or lessee giving  
8 to the seller or lessor the names of prospective buyers or lessees  
9 or otherwise aiding the seller or lessor in making a sale or lease  
10 to another person if the earning of the rebate, discount, or other  
11 value is contingent upon the occurrence of an event subsequent to  
12 the time the buyer or lessee agrees to buy or lease;

13 ~~(6)~~ (22) Service mark shall mean means a mark used in the  
14 sale or advertising of services to identify the services of one  
15 person and distinguish them from the services of others;

16 (23) Telecommunications service means the offering of  
17 telecommunications for a fee directly to the public, or to such  
18 classes of users as to be effectively available directly to the  
19 public, regardless of the facilities used;

20 ~~(7)~~ (24) Trademark shall mean means any word, name,  
21 symbol, or device or any combination thereof adopted and used by a  
22 person to identify goods made or sold by ~~him or her~~ such person and  
23 to distinguish ~~them~~ such goods from goods made or sold by others;

24 ~~(8)~~ (25) Trade name shall mean means a word or a name,  
25 or any combination of the foregoing in any form or arrangement

1 used by a person to identify ~~his or her~~ such person's business,  
2 vocation, or occupation and distinguish ~~it~~ such business, vocation,  
3 or occupation from the business, vocation, or occupation of others;  
4 and

5 (26) Use or promote the use of, for purposes of  
6 subdivision (a)(12) of section 87-302, means contrive, prepare,  
7 establish, plan, operate, advertise, or otherwise induce or attempt  
8 to induce another person to participate in a pyramid promotional  
9 scheme, including a pyramid promotional scheme run through the  
10 Internet, email, or other electronic communications.

11 ~~(9) Chain distributor scheme also known as pyramid sales~~  
12 ~~shall mean a sales device whereby a person, upon a condition~~  
13 ~~that he or she make an investment, is granted a license or right~~  
14 ~~to recruit for profit one or more additional persons who also~~  
15 ~~are granted such license or right upon condition of making an~~  
16 ~~investment and may further perpetuate the chain of persons who are~~  
17 ~~granted such license or right upon such condition. A limitation~~  
18 ~~as to the number of persons who may participate, or the presence~~  
19 ~~of additional conditions affecting eligibility for such license or~~  
20 ~~right to recruit or the receipt of profits therefrom, shall not~~  
21 ~~change the identity of the scheme as a chain distributor scheme,~~

22 ~~(10) Investment shall be any acquisition, for a~~  
23 ~~consideration other than personal services, of personal property,~~  
24 ~~tangible or intangible, for profit or business purposes, and shall~~  
25 ~~include, without limitation, franchises, business opportunities,~~

1 and services. It shall not include real estate, securities  
2 registered under the Securities Act of Nebraska, or sales  
3 demonstration equipment and materials furnished at cost for use in  
4 making sales and not for resale;

5           ~~(11) Referral or chain referral sales or leases shall~~  
6 mean any sales technique, plan, arrangement, or agreement whereby  
7 the seller or lessor gives or offers to give a rebate or discount  
8 or otherwise pays or offers to pay value to the buyer or lessee  
9 as an inducement for a sale or lease in consideration of the buyer  
10 or lessee giving to the seller or lessor the names of prospective  
11 buyers or lessees or otherwise aiding the seller or lessor in  
12 making a sale or lease to another person if the earning of the  
13 rebate, discount, or other value is contingent upon the occurrence  
14 of an event subsequent to the time the buyer or lessee agrees to  
15 buy or lease; and

16           ~~(12) Attorney General shall mean the Attorney General of~~  
17 the State of Nebraska or the county attorney of any county with the  
18 consent and advice of the Attorney General.

19           Sec. 2. Section 87-302, Revised Statutes Supplement,  
20 2009, is amended to read:

21           87-302 (a) A person engages in a deceptive trade  
22 practice when, in the course of his or her business, vocation,  
23 or occupation, he or she:

24           (1) Passes off goods or services as those of another;

25           (2) Causes likelihood of confusion or of misunderstanding

1 as to the source, sponsorship, approval, or certification of goods  
2 or services;

3 (3) Causes likelihood of confusion or of misunderstanding  
4 as to affiliation, connection, or association with, or  
5 certification by, another;

6 (4) Uses deceptive representations or designations of  
7 geographic origin in connection with goods or services;

8 (5) Represents that goods or services have sponsorship,  
9 approval, characteristics, ingredients, uses, benefits, or  
10 quantities that they do not have or that a person has a  
11 sponsorship, approval, status, affiliation, or connection that he  
12 or she does not have;

13 (6) Represents that goods are original or new if they  
14 are deteriorated, altered, reconditioned, reclaimed, used, or  
15 secondhand, except that sellers may repair damage to and make  
16 adjustments on or replace parts of otherwise new goods in an effort  
17 to place such goods in compliance with factory specifications;

18 (7) Represents that goods or services are of a particular  
19 standard, quality, or grade, or that goods are of a particular  
20 style or model, if they are of another;

21 (8) Disparages the goods, services, or business of  
22 another by false or misleading representation of fact;

23 (9) Advertises goods or services with intent not to sell  
24 them as advertised or advertises the price in any manner calculated  
25 or tending to mislead or in any way deceive a person;

1           (10) Advertises goods or services with intent not  
2 to supply reasonably expectable public demand, unless the  
3 advertisement discloses a limitation of quantity;

4           (11) Makes false or misleading statements of fact  
5 concerning the reasons for, existence of, or amounts of price  
6 reductions;

7           (12) Uses or promotes the use of or establishes,  
8 operates, or participates in a chain distributor pyramid  
9 promotional scheme in connection with the solicitation of ~~business~~  
10 ~~or personal investments from~~ such scheme to members of the  
11 public. This subdivision shall not be construed to prohibit a  
12 plan or operation, or to define a plan or operation as a pyramid  
13 promotional scheme, based on the fact that participants in the  
14 plan or operation give consideration in return for the right to  
15 receive compensation based upon purchases of goods, services, or  
16 intangible property by participants for personal use, consumption,  
17 or resale so long as the plan or operation does not promote or  
18 induce inventory loading and the plan or operation implements an  
19 appropriate inventory repurchase program;

20           (13) With respect to a sale or lease to a natural person  
21 of goods or services purchased or leased primarily for personal,  
22 family, household, or agricultural purposes, uses or employs any  
23 referral or chain referral sales technique, plan, arrangement, or  
24 agreement;

25           (14) Knowingly makes a false or misleading statement in a

1 privacy policy, published on the Internet or otherwise distributed  
2 or published, regarding the use of personal information submitted  
3 by members of the public;

4 (15) Uses any scheme or device to defraud by means of:

5 (i) Obtaining money or property by knowingly false or  
6 fraudulent pretenses, representations, or promises; or

7 (ii) Selling, distributing, supplying, furnishing, or  
8 procuring any property for the purpose of furthering such scheme;

9 (16) Offers an unsolicited check, through the mail or  
10 by other means, to promote goods or services if the cashing or  
11 depositing of the check obligates the endorser or payee identified  
12 on the check to pay for goods or services. This subdivision does  
13 not apply to an extension of credit or an offer to lend money;

14 (17) Mails or causes to be sent an unsolicited billing  
15 statement, invoice, or other document that appears to obligate the  
16 consumer to make a payment for services or merchandise he or she  
17 did not order; ~~or~~

18 (18)(i) Installs, offers to install, or makes available  
19 for installation or download a covered file-sharing program on  
20 a computer not owned by such person without providing clear and  
21 conspicuous notice to the owner or authorized user of the computer  
22 that files on that computer will be made available to the public  
23 and without requiring intentional and affirmative activation of the  
24 file-sharing function of such covered file-sharing program by the  
25 owner or authorized user of the computer; or

1           (ii) Prevents reasonable efforts to block the  
2 installation, execution, or disabling of a covered file-sharing  
3 program; or

4           ~~(18)~~ (19) Violates any provision of the Nebraska  
5 Foreclosure Protection Act.

6           (b) In order to prevail in an action under the Uniform  
7 Deceptive Trade Practices Act, a complainant need not prove  
8 competition between the parties.

9           (c) This section does not affect unfair trade practices  
10 otherwise actionable at common law or under other statutes of this  
11 state.

12           Sec. 3. Section 87-303, Reissue Revised Statutes of  
13 Nebraska, is amended to read:

14           87-303 (a) A person likely to be damaged by a deceptive  
15 trade practice of another may be granted an injunction against  
16 it under the principles of equity and on terms that the court  
17 ~~considers reasonable.~~ bring an action for, and the court may grant,  
18 an injunction under the principles of equity against the person  
19 committing the deceptive trade practice. The court may order such  
20 additional equitable relief as it deems necessary to protect the  
21 public from further violations, including temporary and permanent  
22 injunctive relief. Proof of monetary damage, loss of profits, or  
23 intent to deceive is not required. Relief granted for the copying  
24 of an article shall be limited to the prevention of confusion or  
25 misunderstanding as to source.

1           (b) Costs shall be allowed to the prevailing party unless  
2 the court otherwise directs. The court in its discretion may  
3 award attorneys' fees to the prevailing party if (1) the party  
4 complaining of a deceptive trade practice has brought an action  
5 which he knew to be groundless or (2) the party charged with  
6 a deceptive trade practice has willfully engaged in the trade  
7 practice knowing it to be deceptive.

8           (c) A claim filed for a violation of the Uniform  
9 Deceptive Trade Practices Act shall be proved by a preponderance of  
10 the evidence.

11           ~~(e)~~ (d) The relief provided in this section is in  
12 addition to remedies otherwise available against the same conduct  
13 under the common law or other statutes of this state.

14           (e) Subdivision (a)(12) of section 87-302 shall not  
15 be construed to authorize a civil action against an interactive  
16 computer service, provider of telecommunications service, or cable  
17 operator for the actions of an information content provider.

18           Sec. 4. (1) A party filing a petition, counterclaim,  
19 cross-petition, or pleading in intervention alleging a violation  
20 under the Uniform Deceptive Trade Practices Act, within seven days  
21 following the date of filing such pleading, shall provide a copy to  
22 the Attorney General and, within seven days following entry of any  
23 final judgment in the action, shall provide a copy of the judgment  
24 to the Attorney General. This subsection does not apply to Small  
25 Claims Court actions, except as provided in subsection (2) of this

1 section.

2 (2) A party appealing a Small Claims Court order or  
3 judgment to district court involving an issue raised under the act,  
4 within seven days of providing notice of the appeal, shall notify  
5 the Attorney General in writing and provide a copy of the pleading  
6 raising the issue and a copy of the Small Claims Court order or  
7 judgment.

8 (3) A party appealing an order or judgment involving an  
9 issue raised under the act, within seven days following the date  
10 such notice of appeal is filed with the court, shall notify the  
11 Attorney General in writing and provide a copy of the pleading  
12 raising the issue and a copy of the court order or judgment being  
13 appealed.

14 (4) Upon timely application to the court in which an  
15 action involving an issue raised under the act is pending, the  
16 Attorney General may intervene as a party at any time or may be  
17 heard at any time. The Attorney General's failure to intervene  
18 shall not preclude the Attorney General from bringing a separate  
19 enforcement action.

20 (5) All copies of pleadings, orders, judgments, and  
21 notices required by this section to be sent to the Attorney General  
22 shall be sent by certified mail unless the Attorney General has  
23 previously been provided such copies of the pleadings, orders,  
24 judgments, or notices in the same action by certified mail, in  
25 which case subsequent mailings may be made by regular mail. Failure

1 to provide the required mailings to the Attorney General shall not  
2 be grounds for dismissal of an action under the act, but may be  
3 grounds for a subsequent action by the Attorney General to vacate  
4 or modify the judgment.

5           Sec. 5. Section 87-303.02, Reissue Revised Statutes of  
6 Nebraska, is amended to read:

7           87-303.02 When the Attorney General has cause to believe  
8 that any person has engaged in or is engaging in any deceptive  
9 trade practice or unconscionable act listed in section 87-302 or  
10 87-303.01, the Attorney General may:

11           (a) Require such person to file a statement or report  
12 in writing under oath or otherwise, on such forms as shall  
13 be prescribed by the Attorney General, as to all facts and  
14 circumstances concerning the sale, offer, or advertisement of  
15 property by such person, and such other data and information as the  
16 Attorney General deems necessary;

17           (b) Examine under oath any person in connection with the  
18 sale or advertisement of any property;

19           (c) Examine any property or sample thereof, record,  
20 book, document, account, or paper as the Attorney General deems  
21 necessary; and or

22           (d) Pursuant to an order of any district court, impound  
23 any record, book, document, account, paper, or sample of property  
24 which is material to such practice and retain the same in his or  
25 her possession until the completion of all proceedings undertaken

1 under the Uniform Deceptive Trade Practices Act.

2 Sec. 6. Section 87-303.03, Reissue Revised Statutes of  
3 Nebraska, is amended to read:

4 87-303.03 (1) The Attorney General, in addition to other  
5 powers conferred upon him or her by the Uniform Deceptive Trade  
6 Practices Act:

7 (a) May ~~may~~ issue subpoenas to require the attendance  
8 of witnesses or the production of documents, administer oaths,  
9 conduct hearings in aid of any investigation or inquiry, and  
10 prescribe such forms and adopt and promulgate such rules as may be  
11 necessary to administer the Uniform Deceptive Trade Practices Act.  
12 act; and

13 (b) May issue a cease and desist order, with or  
14 without prior hearing, against any person engaged in activities  
15 in violation of the act, directing such person to cease and desist  
16 from such activity.

17 (2) Service of any notice or subpoena may be made in the  
18 manner prescribed by the rules of civil procedure.

19 Sec. 7. Section 87-306, Reissue Revised Statutes of  
20 Nebraska, is amended to read:

21 87-306 Sections 87-301 to 87-306 and section 4 of this  
22 act shall be known and may be cited as the Uniform Deceptive Trade  
23 Practices Act.

24 Sec. 8. Original sections 87-301, 87-303, 87-303.02,  
25 87-303.03, and 87-306, Reissue Revised Statutes of Nebraska, and

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1 section 87-302, Revised Statutes Supplement, 2009, are repealed.